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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
UNIVERSITY DISTRICT COMMUNITY)
COUNCIL; UNIVERSITY PARK)
COMMUNITY CLUB; and CARHT,)

Appellants,)

v.)

PUGET SOUND AIR POLLUTION)
CONTROL AGENCY and SAFECO)
INSURANCE COMPANY OF AMERICA,)

Respondents.)

PCHB Nos. 783 783-A, 783-B

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

THIS MATTER, having come on for formal hearing before the above-
entitled Board on April 15, 16, and 17, in Seattle, Washington, Chris
Smith, Walt Woodward, and W. A. Gissberg presiding for the Board; and,
appellants University District Community Council, University Park
Community Club, and CARHT, appearing by and through their attorney,
Thomas C. Evans; respondent Puget Sound Air Pollution Control Agency
appearing by and through its attorney, Keith D. McGoffin; respondent
Safeco Insurance Company of America appearing by and through its attorney,

1 Peter L. Buck; Olympia court reporter Sherri Darkow, recorded the
2 proceedings; and,

3 The Board having heard and considered all of the testimony, exhibits,
4 arguements, and contentions of the parties, and the Board having been
5 presented with proposed Findings, Conclusions and Order from appellants
6 and respondent Safeco Insurance Company of America, and having
7 received exceptions from both the Puget Sound Air Pollution Control
8 Agency and Safeco Insurance Company of America and replies thereto
9 from appellants, now makes the following

10 FINDINGS OF FACT

11 I

12 On September 13, 1974, Safeco Insurance Company of America (Safeco)
13 applied to the Department of Ecology (DOE) for a complex source permit
14 for the construction of a parking facility for its employees in the
15 University District of the City of Seattle.

16 II

17 On December 12, 1974, the Puget Sound Air Pollution Control Agency
18 (PSAPCA) executed an Order of Approval of complex source signed by Air
19 Pollution Control Officer A. R. Darmkoehler to Safeco, said Order
20 specifically finding that construction of the proposal will not result
21 in the prevention of implementation or maintenance, nor delay in
22 implementation, of the carbon monoxide ambient air quality standard.
23 This was the first complex source permit ever issued by PSAPCA.

24 III

25 Copies of the Order of Approval were mailed to appellants and other
26 interested persons on December 16, 1974; appellants University District

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1 Community Council and CARHT received their copies of said Order on
2 December 18, 1974. Safeco was served with a copy of the Order of
3 Approval on December 17, 1974.

4 IV

5 On January 17, 1975, appellants, each by separate specific appeal,
6 in-hand delivered said appeals to the Pollution Control Hearings Board
7 at Lacey, Washington. Copies of said appeals were then mailed to
8 PSAPCA by LaRene Barlin, a secretary at said Hearings Board. Appellants
9 did not file a copy of the appeal upon PSAPCA or the Department of
10 Ecology. The first time PSAPCA received a copy of the Notice of
11 Appeal was January 22, 1975. No affidavit of proof of service on
12 PSAPCA as specified in RCW 43.21B.230 was ever filed by any appellant
3 with the Clerk of the Board.

14 V.

15 The time period from December 18, 1974, to January 17, 1975, is
16 thirty (30) days. The time period from December 12, 1974 to
17 January 17, 1975 is in excess of thirty (30) days. The time period
18 from December 17, 1974 to January 17, 1975 is in excess of thirty (30)
19 days. The time period from December 18, 1974 to January 22, 1975 is
20 in excess of thirty (30) days.

21 VI.

22 Appellants, through its membership, participated in, reviewed,
23 and commented on the Safeco complex source permit application prior
24 to and during consideration of said application by PSAPCA.

25 VII

6 On September 18, 1974, DOE delegated to PSAPCA the authority to

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1 conduct pre-construction review of complex sources; since the Safeco
2 application had been received prior to this delegation, the Safeco
3 application was forwarded from DOE to PSAPCA on September 18, 1974,
4 with instructions that the application should be processed as though
5 it had been received by PSAPCA on September 13, 1974, the date the
6 application was received by DOE.

7 VIII

8 On but not before October 21, 1974, PSAPCA provided an analysis
9 of the effect of the operation and use of the Safeco complex source
10 proposal, and also a description of PSAPCA's proposed approval.

11 IX

12 A notice stating the availability of materials used in the initial
13 review process is required to be published in a newspaper of general
14 circulation in each county in which the complex source is located. Under
15 said regulation, there shall be a thirty-day period after publication
16 for written comment on the air quality effects of a proposed complex
17 source, and, within forty-five days after publication, a final order
18 regarding construction must be issued. On October 19, 1974, PSAPCA
19 published a "Notice of Application" for the Safeco application. From
20 September 13, 1974, to October 21, 1974, was a time period of thirty-
21 eight (38) days; from October 19, 1974, to December 12, 1974, was a
22 total of fifty-four (54) days.

23 X

24 The preliminary determination by PSAPCA was that the proposed
25 complex source would not result in any ambient air quality standard
26 being violated.

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XI

In making its preliminary determination PSAPCA used, in part, the application as submitted by Safeco, which application used traffic data gathered by Transportation Planning and Engineering, Inc., and air quality data from Dr. August T. Rossano, both Safeco consultants. PSAPCA independently verified the traffic information by obtaining the latest traffic counts from City of Seattle and traffic engineers. PSAPCA also used an Environmental Assessment submitted by Safeco, a draft impact statement prepared by the City of Seattle, and modeling of the 1974 and 1978 worst case carbon monoxide concentrations as indicated by the DOE computer diffusion model utilizing the Mod 4 element. Additionally, PSAPCA personnel visited the site and conducted spot air quality monitoring. However, this air quality monitoring was not adequate for PSAPCA's purposes.

XII

The DOE computer diffusion model used street and freeway geometrics using seven segments and eight receptor points, and a modified Environmental Protection Agency (EPA) emission factor was also used. For the preliminary analysis a Mod 4 element of the DOE computer diffusion model was used.

XIII

The method employed by the DOE computer diffusion model was to calculate 1974 concentrations at the eight receptor points under "E" stability conditions with a wind speed of one meter per second, from eight compass directions beginning from north and rotating forty-five degrees consecutively in a clockwise manner. (For an urban area, "E"

1 stability condition is a measurement of the dispersion of pollutants in
2 the atmosphere and represents the most adverse condition. Wind speed
3 also affects the dispersion of pollutants.) The year 1978 was chosen as
4 the future year for modeling inasmuch as that is the year when the
5 facility will first be in full operation. For the preliminary analysis
6 a Mod 4 element of the DOE computer diffusion model was used.

7 XIV

8 The DOE computer diffusion model utilizing a Mod 4 element indicated
9 that for a wind speed of one meter per second and a projected eight-hour
10 carbon monoxide concentration level, the project would cause carbon
11 monoxide concentrations to exceed the 10 mg/m³ (milligrams per cubic
12 meter) standard (see Finding of Fact XXXVIII) in 1978 at receptor point
13 "E", where the predicted level was 10.4 mg/m³.

14 XV

15 PSAPCA found that predicted 1978 ambient air quality violation for
16 carbon monoxide at receptor point "F" and the value approaching a
17 violation at receptor point "A" were due to these segments being ". . .
18 the receptor points nearest the intersection of I-5 and 45th Street N.E.
19 This is attributable to the high traffic flux on these segments
20 and has no significant relationship to the construction of the Safeco
21 Garage." However, this explanation is inadequate. Receptor point "D"
22 is closer to the intersection of I-5 and 45th Street N.E. than receptor
23 point "A"; no violation prediction was made for it. Receptor point "A"
24 is closer to the proposed garage than "D" is. Receptor point "C" is as
25 close to the intersection of I-5 and 45th Street N.E. as is receptor
26 point "A".

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XVI

The DOE computer diffusion model utilizing the Mod 4 element predicted numerous violations in 1978 ambient air quality standards for carbon monoxide attributable to the garage for a wind speed of .3 meters per second, a wind speed slightly under one-mile per hour. Violations were predicted for almost every receptor when using this wind speed.

XVII

PSAPCA, although given the predicted results of the DOE computer diffusion model utilizing the Mod 4 element run for .3 meters per second, did not include these results in its Public Review Document, which document was the document provided pursuant to WAC 18-24-090, the purpose of it being to inform the public of the basis upon which PSAPCA had reached a preliminary analysis of approval. Prior to making its preliminary determination, PSAPCA in good faith determined that results obtained from using a wind speed of .3 meters per second were unreasonable and therefore did not include such results in the Public Review Document.

XVIII

PSAPCA drew the following conclusions from the Mod 4 results:

. . . the maximum eight-hour projection of 10.4 mg/m³ is barely above the standard and is representative of worst case conditions. It is even possible that such a concentration could occur only once during the year and there would then in fact be no standard violation. Because of the limitations of the modeling process, and limited monitoring done, there is a degree of uncertainty in projections of this nature.

XIX

To evaluate complex source applications the DOE developed a

1 computer diffusion model which predicts CO concentrations. This model
2 has a number of elements, including one which was originally called
3 "Mod 4." The preliminary analysis of PSAPCA utilized the DOE model
4 which had the "Mod 4" element in it.

5 Subsequently, Fred Fenske, a DOE employee who had designed the
6 model, discovered an internal coding error in the Mod 4 element dealing
7 with cross-range diffusion. This error caused the model to predict
8 erroneously high CO levels.

9 Mr. Fenske corrected the error in the Mod 4 element and called the
10 new, corrected element "Mod f." All persons, including PSAPCA, who had
11 used the model with the Mod 4 element were notified of the error.
12 Subsequently, on November 25, 1975 PSAPCA re-ran the data for the Safeco
13 project using the corrected model.

14 Mr. Fenske was correct in determining that the Mod 4 element did
15 have an error in it. Assuring that the same parameters of wind speed,
16 stability conditions, etc. are used, the diffusion model utilizing the
17 Mod f element makes more accurate predictions of CO levels than a model
18 utilizing the Mod 4 element, which latter element led to predictions of
19 erroneously high CO levels.

20 XX

21 November 25, 1974, was exactly seven (7) days after the close of the
22 public review period established by regulation. Every person who had
23 previously contacted the Agency or examined the previous analysis was
24 sent a letter explaining that the corrected model had been used and these
25 people were sent a copy of the corrected results ten (10) days before the
26 final Agency decision was made.

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XXI

The term "background" carbon monoxide concentrations can be used to mean concentrations which would exist if one shut off all carbon monoxide sources of generation known and used in an analysis. A separate background factor was not included in the DOE diffusion model. A background factor of 2 mg/m³ could be added to computer results for the proposed garage. The highest CO concentration level predicted in the corrected analysis used by PSAPCA was 5.7 mg/m³. If the background level was added to this the predicted value would be 7.7 mg/m³.

"Baseline" carbon monoxide levels are levels estimated to be worst case levels. The Department of Ecology had developed a baseline estimate for the area of the proposed Safeco complex, which was 8 ppm over an 8-hour average time.

XXII

The Mod f results were done for a worst case wind speed of one meter per second only; no violation predictions were indicated by the Mod f results.

XXIII

The use of the corrected Mod f element is not discussed or explained in the PSAPCA Public Review Document, the final environmental impact statement, the draft environmental impact statement, or the environmental assessment. All persons who had examined the PSAPCA analysis or contacted PSAPCA were sent a copy of the computer results using the corrected element. This letter was included in PSAPCA's files and the results and a statement explaining them were placed in PSAPCA's Public Review Document.

FINAL FINDINGS OF FACT,
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1 XXIV

2 At no time did the DOE designer of the model consider whether the
3 adoption of the model, or the Mod 4 or the Mod f element, constituted an
4 action for purposes of compliance with RCW 43.21C, the State Environ-
5 mental Policy Act (SEPA). The DOE computer diffusion model is a
6 scientific attempt to use a computer to predict what will happen under a
7 given set of circumstances. As such, development of the model and
8 correction of errors therein do not affect the environment; the model
9 simply makes predictions about the environment.

10 XXV

11 The responsible official for purposes of demonstrating compliance
12 with SEPA was Arthur Dammkoehler, Air Pollution Control Officer.
13 PSAPCA considered the City of Seattle's record for showing compliance
14 with SEPA.

15 Prior to application for a complex source permit, Safeco applied
16 to the City of Seattle for a building permit. The City, in considering
17 that application, prepared, circulated, and issued a draft and final EIS.
18 PSAPCA and the appellants participated in the review of the draft state-
19 ment. Included in the EIS was information concerning the air quality
20 analysis in connection with Safeco's project. PSAPCA utilized the
21 the draft and final EIS issued by the City of Seattle in its consideration
22 of the application for a complex source permit. PSAPCA gave proper notice
23 that it would utilize the City's documents and the appellants had notice
24 thereof.

25 XXVI

26 Arthur Dammkoehler did not consider any economic factors whatsoever
27 FINAL FINDINGS OF FACT,
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1 in reaching the decision to issue an Order of Approval for the Safeco
2 complex source application.

3 XXVII

4 Both Messrs. James Pearson and Arthur Dammkoehler of PSAPCA utilized
5 and considered the EIS in arriving at a decision to issue the complex
6 source permit. Mr. Dammkoehler's primary attention in considering the
7 EIS was directed to the air quality provisions thereof.

8 XXVIII

9 The alternatives section of the EIS was adequate; appellants
10 produced no evidence as would prove otherwise.

11 XXIX

12 Appellants did not prove that PSAPCA failed to take into account
13 health considerations in its approval of the complex source permit
14 application. By judging the effects of the project based on the state
15 and national ambient air quality standard for carbon monoxide, PSAPCA
16 considered the health effects of its approval of the complex source
17 permit application.

18 XXX

19 Appellants did not present any evidence that would prove that:

- 20 A. The responsible official of the lead agency did not
21 exercise direct supervision and control over the
22 efforts of the outside consultants used in the
23 development of the EIS;
- 24 B. The responsible official of the lead agency did not
25 direct the areas of research, examinations, and
26 organization of the EIS;
- 27 C. The lead agency did not accept the responsibility
for drafting of the final EIS, but rather, had
private consultants take most of the responsibility;

-6
27 FINAL FINDINGS OF FACT,
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- 1 D. The EIS does not adequately identify irretrievable
2 commitments of resources;
- 3 E. The EIS does not adequately identify adverse impacts
4 which may be mitigated;
- 5 F. The EIS does not adequately identify or examine
6 alternatives to the proposed action; and
- 7 G. The EIS does not adequately identify adverse environ-
8 mental impacts.

9 XXXI

10 PSAPCA did not consider social and cultural issues in approving
11 Safeco's application for a complex source permit.

12 XXXII

13 The final EIS was completed and delivered to PSAPCA on December 12,
14 1974. Mr. Dammkoehler and Mr. Pearson briefly reviewed sections in the
15 final EIS which concerned them. The same day, PSAPCA approved the comp'
16 source permit.

17 XXXIII

18 To determine whether a complex source will result in violation of
19 ambient air quality standards, it is necessary to identify potential
20 worst case conditions of which, wind speed is one consideration. The
21 worst case meteorological conditions also include wind direction and
22 persistence, and wind stability.

23 XXXIV

24 Wind speed is crucial to determining atmosphere dispersion of
25 carbon monoxide; the slower the wind speed the less dispersion of
26 carbon monoxide from a complex source.

27 XXXV

Dr. Rossano, Safeco air quality expert, conducted an air monitoring

1 program in the vicinity of the proposed complex source during the
2 period February 3 to March 1, 1974; subsequent monitoring was done by
3 him on April 8 to April 12, 1974. On March 1, 1974, at location
4 station #2, Dr. Rossano found that the wind speed was zero-to-one miles
5 per hour for the thirteen (13) hour time period 7 AM to 8 PM; such
6 a wind speed would approximate zero to .5 meters per second.

7 XXXVI

8 Safeco's witness (Rossano) did only one month's work on carbon
9 monoxide background in the University District as a basis for his
10 report. A longer study, up to one or two years, would have been better.

11 XXXVII

12 For a worst case wind speed of .5 meters per second (approximately
13 1.1 miles per hour), the DOE computer diffusion model using the Mod f
14 element indicates that the proposed complex source would cause violations
15 at receptor points "A" (10.8 mg/m³), "C" (10.7 mg/m³), and "H"
16 (10.2 mg/m³). For a worst case wind speed of .3 meters per second
17 (approximately .66 miles per hour), violations are indicated for most
18 receptor points. The DOE computer model does not work when using wind
19 speeds of less than one meter per second.

20 XXXVIII

21 National ambient air quality standards exist for carbon monoxide,
22 the pollutant of major interest. These standards are the same as those
23 enforced by the State of Washington and PSAPCA. They are as follows:
24 thirty-five ppm (parts per million) averaged over a one-hour period; nine
25 ppm (10 mg/m³) averaged over a consecutive eight-hour period. These
26 levels can be exceeded only once per year.

27 FINAL FINDINGS OF FACT,
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1 XXXIX

2 Since air quality monitoring adequate for PSAPCA's purposes was not
3 conducted and since selection of a wind speed of one meter per second was
4 not based on actual experience, it is impossible to determine whether or
5 not the operation or use of the proposed complex source will prevent the
6 attainment or maintenance of a state ambient air quality standard for a
7 motor-vehicle-related air contaminant.

8 XL

9 The lower limit of wind speed used by PSAPCA or an assumption in
10 Mod f, i.e., one meter per second, is an arbitrary figure selected
11 without any foundation in fact. It was developed by DOE working
12 entirely independently of PSAPCA and without any effort to relate it to
13 the specific Safeco complex source proposal. The evidence adduced at
14 the hearing shows that the figure was selected without consideration as
15 to the actual wind speed in the area as could be determined by measure-
16 ments over an appropriate period of time. The figure was an arbitrary
17 one selected to make the model work. Insofar as the air pollution
18 prediction model used the one meter per second wind speed, it is in error.

19 XLI

20 For traffic input data, Safeco's information was sufficiently
21 accurate to allow PSAPCA to rely thereon.

22 XLII

23 PSAPCA did not consider and need not consider, any air contaminant
24 other than carbon monoxide when making its determination of whether an
25 ambient air quality standard would be violated.

XLIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

Appellants University District Community Council, University Park Community Club, and CARET, filed timely and proper appeals with this Board so as to give jurisdiction to this Board to review that decision reached by PSAPCA to issue an Order of Approval for the Safeco complex source project. RCW 43.21B.120, requiring that an order issued by PSAPCA shall become final ". . . unless, no later than thirty days after the date that the notice and order are served, the person aggrieved by the order appeals to the hearings board" is consistent with WAC 371-08-080, requiring that "The Notice of Appeal shall be filed within thirty days from the date the copy of the order or decision of the Department . . . or pollution control board (or authority) was communicated to the appealing party." Appellants were aggrieved persons within the meaning of RCW 43.21B.120; as such they were required to appeal to this Board within thirty days after they were served with a copy of the final decision. The uncontroverted evidence is that appellants filed their appeals with this Board within thirty days after having been served with a copy of the final decision. An appellant is not "served" and the decision has not been "communicated" until it has actually been received. See Rodriguez v. Department of Labor & Indus.,

1 85 Wn.2d 949 (1975).

2 II

3 Appellants were required to be served with a copy of the final
4 order issued by PSAPCA. Having made their presence known through
5 numerous comments and submittals directed to PSAPCA, appellants became
6 entitled to notice, and PSAPCA was charged with the knowledge that
7 appellants would potentially be aggrieved persons within the meaning of
8 RCW 43.21B.120. See Gau v. Utilities & Transp. Comm'n, 13 Wn. App. 219
9 (1975). As such, PSAPCA was required to and properly did mail a copy
10 of the final decision to appellants.

11 III

12 The requirement of RCW 43.21B.230, providing for perfection of an
13 appeal "within the time specified herein" is not jurisdictional in
14 nature as to filing with persons and agencies other than the Hearings
15 Board itself. RCW 43.21B.120 states:

16 Any order issued by the department or by any air pollution
17 control board or authority established pursuant to chapter
18 70.94 RCW shall become final unless, no later than thirty days
19 after the date that the notice and order are served, the
20 person aggrieved by the order appeals to the hearings board as
21 provided for in this act. (Emphasis added)

22 The critical filing period is that time period in which the appeal
23 must be filed with the hearings board, the agency which actually hears
24 the appeal. "Perfection" comes by filing with the other interested
25 governmental groups; it is not jurisdictional. Cf. Schmitt v. Matthews,
26 12 Wn. App. 654 (1975). The uncontroverted evidence is that the Board
27 itself did mail copies of the appeals to PSAPCA so as to "perfect" the
28 appeal. In any event, respondents have not been prejudiced by appellants.

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1 failure to perfect their appeals.

2 IV

3 Appellants had standing to bring these appeals. Persons directly
4 and adversely affected by noise and fumes have standing to raise SEPA
5 issues. Leschi Improvement Council v. Department of Highways,
6 84 Wn.2d 271 (1974). See also: Washington Utilities and Transportation
7 Commission v. FCC, 7 ERC 1561. Appellants also had standing under the
8 Federal Clean Air Act, the Washington State Clean Air Act, and WAC 18-24.
9 Additionally, this issue was not one framed in the Board's Pre-Hearing
10 Conference Order; the defense of lack of standing must be affirmatively
11 pleaded by respondents, which they have not done except in their closing
12 arguments at the conclusion of the hearing.

3 V

14 The regulation in effect at the date of issuance of a permit governs
15 the proceedings at this Board when said permit comes on for hearing on
16 appeal to this Board. As respondent Safeco correctly argued in its
17 Opening Memorandum, the applicable standard is WAC 18-24-090(5)(b):

18 The Safeco complex source permit application was made and
19 the permit was issued pursuant to W.A.C. 18-24 which has been
20 approved as part of the Washington Implementation Plan by the
EPA. The standard for granting or denying an Order of Approval
is found in W. A. C. 18-24-090(5)(b):

21 (b) After consideration of comments and any additional
22 information submitted during the comment period, and within
23 forty-five days after publication, the department shall issue
an order of approval or an order of prevention of the
construction or modification of the complex source.

24 (1) An order of approval hereunder shall include such
25 conditions of operation as the department finds reasonably
26 necessary to attain or maintain any air quality standard for
any motor vehicle related contaminant or to prevent interfer-
ence with the achievement of any provision of the Washington
state implementation plan for national ambient air quality

27 FINAL FINDINGS OF FACT,
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standards, as approved or promulgated by the United States environmental protection agency.

(11) An order of prevention hereunder shall be issued only upon finding by the department that, taking into consideration all reasonable conditions of operation which might be imposed, operation, maintenance, or use of the complex source either will prevent the attainment or maintenance of an air quality standard for a motor vehicle related air contaminant or will interfere with the achievement of a provision of the Washington state implementation plan for national ambient air quality standards, as approved or promulgated by the United States environmental protection agency.

WAC 18-24-090(5)(b) thus requires us to ask: would the operation or use of Safeco's complex source prevent the attainment or maintenance of a state ambient air quality standard under WAC 18-24-090(5)(b)(11)? It is impossible to answer this question since air quality monitoring adequate for PSAPCA's purposes was not conducted and since selection of a wind speed of one meter per second was arbitrarily made and not based on actual experience.

VI

Under the Federal Clean Air Act, the Administrator of the Environmental Protection Agency was required to establish national primary ambient air quality standards and national secondary ambient air quality standards for air pollutants. The national primary ambient air quality standards are designed to protect the public health. The national secondary ambient air quality standards are designed to protect the public welfare from any known or anticipated adverse effects. 42 U.S.C. § 1857c(4). Through the regulations the Administrator of the Environmental Protection Agency has set the national primary and secondary standards. 40 C.F.R. § 50.2.

The Administrator determined for carbon monoxide that the national

primary and secondary standards should be identical. The eight-hour standard for carbon monoxide is ten milligrams per cubic meter (9 ppm) as the maximum eight-hour concentration which is not to be exceeded more than once per year. The one-hour standard is forty milligrams per cubic meter (35 ppm) as the maximum one-hour concentration which is not to be exceeded more than once per year. 40 C.F.R. § 50.8.

The Washington State Clean Air Act calls for establishment of air quality standards by the Department of Ecology. RCW 70.94.331 as amended by RCW 43.21A.060(3). The Department of Ecology has established ambient air quality standards for carbon monoxide (CO) identical to the federal standards, WAC 18-32-030.

In the Federal Clean Air Act, Congress required that each state adopt an implementation plan for maintenance and enforcement of all primary and secondary standards. On June 14, 1974, the State of Washington submitted WAC 18-24 to the EPA for its review as part of the state's implementation plan. Those regulations became effective on August 15, 1974, pursuant to WAC 18-24-050. On November 15, 1974, Russell Train, Administrator of the EPA, approved these complex source permit regulations as part of the Washington State Implementation Plan. 39 F.R. 40855-57, November 21, 1974. Thus, WAC 18-24 was the effective regulation as of the date of issuance of the Safeco complex source final order (December 12, 1974).

VII

Safeco was required to obtain a complex source permit under WAC 18-24-070, which requires a permit, at subsection (e), for "Any complex source located in King, Pierce, Snohomish, Clark, or Spokane

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1 | counties which will provide 250 or more parking spaces;"

2 | VIII

3 | WAC 18-24-090, entitled "REVIEW OF PROPOSED CONSTRUCTION OR
4 | MODIFICATION." provides at subsections 5(a) through 5(b) as follows:

5 | (a) The analysis provided for in this subsection and
6 | the department's proposed action, together with the informa-
7 | tion submitted by the owner or operator, shall be made avail-
8 | able to the public in at least one location in each county in
9 | which the complex source is to be located. The availability
10 | of such materials shall be made known by notice published in
11 | a newspaper of general circulation in each county in which the
12 | complex source is to be located. A copy of such notice shall
13 | be sent to the United States environmental protection agency
14 | and appropriate state and local agencies. There shall be a
15 | thirty-day period after publication for written comment on
16 | the air quality effects of the complex source. Only written
17 | comments will be considered by the department.

18 | (b) After consideration of comments and any additional
19 | information submitted during the comment period, and within
20 | forty-five days after publication, the department shall issue
21 | an order of approval or an order of prevention of the
22 | construction or modification of the complex source.

23 | PSAPCA complied with WAC 18-24-090(5)(a) and (b); there was no evidence
24 | that appellants were denied a fair procedural process.

25 | IX

26 | RCW 43.21B.160 grants the hearing powers to this Board as outlined
27 | by the provisions of chapter 34.04 RCW. RCW 34.04.090(2) specifically
28 | allows for the presentation of evidence and argument by all parties to
29 | an appeal. From this the Board finds that the proper standard of review
30 | of a complex source permit issued by the Department or local air
31 | pollution control authority is de novo. Chapter 371-08 WAC reflects
32 | this standard.

33 | X

34 | The action of PSAPCA which is subject to SEPA, for purposes of

35 | FINAL FINDINGS OF FACT,
36 | CONCLUSIONS OF LAW AND ORDER 20

1 this appeal, is the issuance of an "Order of Approval" under
2 WAC 18-24-090. PSAPCA must comply with SEPA in regard to complex source
3 proceedings. PSAPCA did fully comply with SEPA.

4 Development by the Department of Ecology of a computer diffusion
5 model with a Mod 4 element and subsequent correction of an error through
6 substitution of the Mod 5 element did not constitute major actions, nor
7 did they significantly affect the quality of the environment for
8 purposes of demonstrating compliance with SEPA. Use by PSAPCA of a
9 computer model developed by the Department of Ecology was also not a
10 major action or an action which significantly affected the quality of
11 the environment for purposes of demonstrating compliance with SEPA.

12 XI

13 PSAPCA could use means other than using the City of Seattle's
14 Environmental Impact Statement to comply with SEPA, but, under the
15 circumstances of this case, was not required to do so, or even consider
16 doing so. PSAPCA was not required to, on its own, consider whether
17 approval of the Safeco complex source permit constituted an action for
18 purposes of SEPA. PSAPCA needed only to determine that the City of
19 Seattle was preparing an EIS. The City of Seattle had previously prepared
20 an adequate environmental impact statement in connection with this
21 project. PSAPCA utilized that impact statement in reaching its decision
22 on the complex source permit and in so doing, fully complied with SEPA.

23 XII

24 One of the primary purposes of SEPA is to provide responsible
25 officials with an environmental disclosure of the effects of a proposed
26 action (project). Considering the multiplicity of permits required

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER 21

1 from various governmental jurisdictions in order to proceed with a
2 single project, it would be ridiculous to require each governmental
3 unit to prepare its own EIS. Where, as here, an adequate EIS has been
4 prepared by one agency (Seattle is the local agency), and another agency
5 with jurisdiction (PSAPCA) has had an opportunity to comment on the
6 draft thereof, any reasonable interpretation of SEPA compels the
7 conclusion that the EIS may be utilized by PSAPCA.

8 XIII

9 Mr. Damrkoehler did not consider any economic issues whatsoever
10 in arriving at a decision to issue the complex source permit. He was
11 not required to do so. The primary mission of PSAPCA is environmentally
12 directed to the protection of air quality. To require such an agency to
13 consider environmentally unrelated and general economic and social
14 consequences of its actions is unwarranted.

15 XIV

16 The final EIS prepared by the City of Seattle was adequate as a
17 matter of law.

18 XV

19 PSAPCA, in WAC 18-24-090(4)(c), had ample authority to require
20 information on "Existing air quality in the vicinity of the complex
21 source" Cost of such a study cannot be an excuse for not requiring
22 the study when human health is at issue. PSAPCA's duty requires a more
23 exhaustive approach; inasmuch as the Safeco study was conducted over
24 too short a period and too narrow a scope, it was inadequate for PSAPCA's
25 purposes.

XVI

PSAPCA's action in issuing an Order of Approval for the proposed Safeco complex source was erroneous.

XVII

Any Finding of Fact herein which is deemed to be a Conclusion of Law is adopted herewith as same.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The action of respondent PSAPCA issuing the complex source permit CX-1 to respondent Safeco is reversed. These matters are remanded to respondent PSAPCA for further study to establish an appropriate worst case wind speed for the University District for purposes of the computer diffusion model and for air quality monitoring by PSAPCA which will be sufficient for PSAPCA's purposes and in compliance with the law.

DATED this 4th day of February, 1976.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith
CHRIS SMITH, Chairman

(See dissent)
W. A. GISSBERG, Member

Walt Woodward
WALT WOODWARD, Member

1 GISSBERG, W. A. (dissenting)--The appellants, having the burden of
2 proof, have utterly failed to produce any creditable evidence showing
3 that PSAPCA's permit issuance was erroneous. On the contrary, the only
4 reliable testimony on the existing CO background in the University District
5 was that of Dr. Rossano. He is an expert on air quality analyses and is
6 possessed of impressive academic and applied credentials and experience.
7 He conducted a study to assess the impact on air quality of the proposed
8 new Safeco Services Building to be located at Roosevelt Avenue and North-
9 east 43d street in Seattle. In order to forecast the air quality of the
10 proposed structures, Dr. Rossano monitored CO levels around a comparable
11 existing structure which has very similar characteristics in terms of
12 size, design and traffic patterns and is influenced by the same
13 meteorological parameters. The monitoring was conducted on days
14 having the greatest atmospheric stability when the air was relatively
15 stable and the "winds" were weak, i.e., on a "worst condition" basis and
16 at times coinciding with the rush hour traffic conditions. On the basis
17 of his studies he concluded and predicted that the CO concentrations in
18 the vicinity of the new Safeco building were and upon its completion,
19 would "be well within the ambient standards set by the U. S. Environmental
20 Protection Agency."

21 Among reasons stated by the majority of the Board for its action is
22 that the Rossano study was conducted over too short a period, was too narrow
23 in scope, was inadequate for and could not be relied upon by PSAPCA. I
24 disagree with each of such reasons, whether framed as fact or law. The
25 concurring opinion seizes upon Dr. Rossano's alleged statement that a
26 "two year study would have been preferred." It is my distinct impression

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER


1 and recollection that such testimony was in response to a question to
2 him on cross examination as to whether "ideally" a one year monitoring
3 study would be better than one month, to which he agreed and added a
4 caveat that a two year study would be "better " The majority, in my
5 view, completely misconstrued and incorrectly interpreted his real
6 meaning. To me, he was saying that a study for that period of time
7 would be unreasonable. At any event, there is absolutely no evidence
8 or proof in the record that a more lengthy sampling program would result in
9 any change of the baseline CO levels found by him after a one month study.

10 Acting independently of Dr. Rossano, the Department of Ecology
11 (DOE) modeled the 1974 and 1978 worst case CO concentrations using its
12 computerized complex source diffusion model. The DOE model predicted
13 that there would be no CO ambient air violation. Appellants and the
14 majority of the Board attack the validity of the computer prediction
15 because of its use of an assumed worst case wind speed of one meter per
16 second (slightly in excess of two miles per hour). Appellant's computer
17 analyses, using the same model and data (except for a wind speed of .3
18 meter per second) predicted that ambient air violations would occur
19 However, the uncontradicted and undisputed testimony in the record before
20 us by recognized experts in their field was that when a .3 meter per
21 second wind speed is utilized, the accuracy of the model is questionable
22 and that the use of such a wind speed was inappropriate and unreliable
23 Other testimony established that a wind speed of one meter per second,
24 "E" stability and an eight hour standard represented the worst case
25 conditions and that measurements of wind speeds of less than one meter
26 per second cannot be accurately made.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Appellants have the burden of proving, by the preponderance of
2 competent and believable evidence, that the permit issued by PSAPCA
3 would prevent the attainment or maintenance of any air quality
4 standard. Not only have they failed to meet that burden, I am left
5 with the clear and distinct impression that any findings of fact to
6 the contrary are unsupported by the record and under such circumstances
7 amounts to a wilful action in disregard of the facts. Thus, the action
8 of the majority of this Board is not only contrary to the preponderance
9 of the evidence but is arbitrary and capricious and/or clearly erroneous
10 in view of the entire record.

11 For the reasons herein set forth, I disagree with certain of the
12 majority Findings of Fact and Conclusions of Law. I would uphold the
13 Order of Approval of complex source issued by the Puget Sound Air
14 Pollution Control Agency

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17 W. A. GLISSBERG, Member
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